86-311

Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1986

WILLIAM L. RICHARDS
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA
Respondent.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

==========

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the FAA violated statutory Merit Systems principles of federal employment by discharging Petitioner, an air traffic controller, for not reporting for work during the first few days of the PATCO strike when the undisputed evidence shows that:

(a) Petitioner openly and courageously opposed the strike at all relevant times, and never supported it or intended to make common cause with the strikers; and

(b) Petitioner's absence was explained by the fact that his wife knew he had been harassed and threatened by militant PATCO supporters, and, therefore, he reasonably feared that crossing

the picket line would have so increased the tensions on his wife (who was already under severe tension caused by a family crisis) as to cause a recurrence of a stroke and jeopardize her life.

2. Whether the FAA violated statutory Merit System principles as well as the principles of estoppel in pais by refusing to reinstate Petitioner after the PATCO strike even though:

(a) The FAA O'Hare Field Facilities Chief had dissuaded Petitioner from resigning prior to the strike by assuring him that he (the Chief) would have discretion after the strike to reinstate some controllers who did not cross the PATCO picket line and that he (the Chief) would exercise that discretion in Petitioner's favor; and

(b) Other controllers who did resign shortly before the strike were promptly, upon their request, reinstated after the strike.

3. Whether the Merit Systems Protection Board seriously misinterpreted Merit Systems principles by holding that the failure of an air traffic controller to report for work during the initial days of a strike establishes a conclusive presumption that his removal will promote the efficiency of the service and by summarily rejecting as "irrelevant" the testimony of Petitioner's managers and supervisors that his return to service would, in fact, promote the efficiency of the service.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The parties appearing in the caption of this case were the only parties to the proceedings in the Federal Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit and the opinion of the Merit Systems Protection Board both are set forth in full in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 27, 1986. This Petition for Certiorari was filed within 90 days of the entry of judgment. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are 5 U.S.C. §2301(b)(2) and (b)(8)(A); 5 U.S.C. §2302(b)(10) and (b)(11). Also involved are 5 U.S.C. §7513(a) and §7701(a) and (c)(1). The text of the relevant

portions of these statutes is set out in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner William Richards was one of the Air Traffic Controllers who was discharged in 1981, allegedly because of his participation in the PATCO strike (Tr.199,200).[1/] He had been a Controller for 21 years, had an excellent record, and had received many awards (Tr.827-829).[2/] His Facilities Chief testified that he was at least as able and effective a Controller as any who were at work at O'Hare Field in Chicago after the strike (Tr.209).

1/ "A.___" refers to the page number of the Appendix hereto.

2/ "Tr.___" refers to the page number of the transcript of the hearing before the Hearing Officer of the Merit Systems Protection Board, which is part of the record in this case.

Petitioner Richards was one of the very few Controllers at O'Hare who had consistently and openly opposed the PATCO strike. He never favored a strike, never voted to strike, and actively attempted to prevent the strike by, for example, himself preparing a favorable summary of the FAA's last bargaining offer and presenting it at a union meeting (Tr.837-846,843,858-859).

Militant PATCO members refused, in ways which threatened air traffic safety, to cooperate with Petitioner Richards at work, and made threatening remarks in his presence about what would happen to persons who did not support a PATCO strike, including a statement that "there would be some heads busted" (Tr.834,836, 841,842,844,850).

Petitioner Richards' wife was a victim of an earlier stroke which nearly took her life (Tr.864,865), and had, less

than two months before the strike, at a time when Richards was being subjected to threats and harassment, again exhibited symptoms of the kind which had preceded her earlier stroke (Tr.864.866). At the time of the strike, she was under medical orders to avoid psychological tension (Tr.862,863). As of August 3, the date on which the strike began, his wife was already under significant tension because both of the Richards' children were missing from home, their whereabouts were unknown, and on the night the strike began, their son had been involved in an automobile accident which demolished their automobile (Tr.863,868).

Petitioner's undisputed testimony was that he did not report for work during the initial days of the strike because of his deep concern that if he did so, under all the circumstances at that time, he would be placing his wife's health in serious jeopardy (Tr.868).

The FAA Facilities Chief at O'Hare Field did not deny knowledge of the above facts nor did he question the accuracy of Petitioner Richards' testimony regarding them (Tr.206).

Several weeks before the strike began, Petitioner Richards had attempted to resign, because he feared the consequences of crossing the picket line, but he did not want to break the law (Tr.845). Richards testified that Facilities Chief Anderson, learning of his intent to resign, dissuaded him from resigning, stating that "probably some people would be fired" in the event of a strike and "if I (Richards) was fired that he would have no problem rehiring me, that he thought Facilities Chiefs at each facility would be given a great deal of discretion in who they wanted back to work" (Tr.846,847). Anderson himself testified:

> I did tell him that I felt the Chiefs would have a lot of discretion on who were going to be rehired if a strike occurred; that if a strike did not occur and he did resign, then he, in effect, would be without a job and that the other people would still be on board (Tr.885,886).

Richards had been employed at the time of a "sickout" in a prior year, which had been engaged in by 17 or 18 FAA employees. Two of the employees had been discharged as a result. Both were rehired after the sickout (Tr.847).

The FAA stipulated that other FAA Controllers who did resign, even after the strike in issue here had begun, were reemployed after the strike. (Appellant Richards Exh.2, received at Tr.879). The agency also stipulated that if Richards had actually resigned, he would have been given serious reconsideration by the FAA for reinstatement. (Appellant Richards Exh.3, Tr,788-790).

No supervisor, manager, or agent of the FAA testified that Mr. Richards' removal did or could promote the efficiency of the service. When asked whether if Richards were restored to duty he would have any concerns about the well-being of the agency, Operations Officer Baldwin testified that he would welcome Petitioner Richards' return to work, and when asked if his return would have any adverse effect either on Richards' own performance or on the performance of other Controllers, he stated "It would be just the opposite" (Tr.878,879). Facilities Chief Anderson admitted that if Richards were restored to work, he would expect him to continue to be both dependable and reliable (Tr.209).

The Merit Systems Protection Board found that Richards "did not want to cross the picket line," that the threats of physical violence were only overheard

and "had not been directed to him," and that the "non-physical abuse" which Richards had encountered did not "constitute...duress" (A.12,13). As to Richards' concern about his wife's health, the Board concluded that Richards should have "known that the likelihood of the violence was small or non-existent" (A.14). The Court of Appeals, with respect to Richards' concern about his wife's condition, stated only:

> ...the Board could permissibly hold that, in the emergency crisis of a nation-wide controllers' strike, that was not good cause for failing to come to work (A.8).

With respect to the assurances given by the Facilities Chief, the Merit Systems Protection Board opinion stated:

> At the time of the anticipated June 22 strike, the Tower Chief and appellant might have speculated that the outcome of the strike would be consistent with past resolutions of work actions (A.21).

The Board nevertheless went on to hold that Appellant's continued reliance on his Facilities Chief's assurances at the time of the August 3 strike was "unreasonable." The reasons given by the Board were that on Saturday, August 1, the Tower Chiefs were advised by the Federal Government that there would be no amnesty and that employees participating in a strike "would take the full consequences of their violation of federal law and their oath not to strike" (A.21). The Board did not find that Facilities Chief Anderson had ever communicated that information to Petitioner Richards, nor that he had ever withdrawn or modified his assurances.

The Court of Appeals affirmed, without analysis, both the Board's holding that Appellant's reliance on "selected remarks" of Anderson was unreasonable and that his continued reliance on August 3 was also unreasonable (A.7).

The Merit Systems Protection Board held that the discharge of a federal employee who does not report for work during a strike promotes the efficiency of the service. It held that no factual findings were necessary to support that conclusion and that the testimony of top O'Hare officials that the restoration of Petitioner to service would not adversely affect his own performance or that of others and that his return to work would promote the efficiency of the service is "not relevant on the issue of the efficiency of the service" (A.25). The Court of Appeals opinion is silent on this issue, thus apparently affirming, without comment, the MSPB's holding.

The Court of Appeals for the Federal Circuit denied the Richards' petition for review, holding that the decision of the Merit Systems Protection Board was:

...not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence (A.8).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with Decisions of Other Courts of Appeals Regarding the Appropriate Test for When an Employee Can Be Found to Have Participated in a Strike

Cases arising under the National Labor Relations Act have made clear that under federal law only:

> ...when an employee as a matter of principle refuses to cross a picket line at his own employer's place of business, the employee...has in effect plighted his troth with the strikers, joined in their common cause, and has thus become...a striker himself.

NLRB v. Southern Greyhound Lines, 426 F.2d 1299,1301 (5th Cir. 1970).

In NLRB v. Union Carbide Corporation, 440 F.2d 54,56 (4th Cir. 1971), however, when there was no factual basis for finding that an employee's refusal to cross a picket line was "based on principle," the court said:

> He makes no common cause, and contributes nothing to mutual aid or protection in the collective bargaining process.

And in Plain Dealer Publishing Co. v. Cleveland Typo Un. No.53, 520 F.2d 1220,1228 (6th Cir. 1975), the court held that one whose refusal to cross a picket line is not based on principle "may not be considered a striker." See also United Federation of Postal Clerks v. Blount, 325 F.Supp. 879,884, aff'd. 404 US. 802 (1971).

Here, Petitioner Richards strongly and openly opposed the strike, and was subject to abuse and dangerous non-cooperation by militant PATCO supporters

because of his opposition to the strike. Richards never supported or joined in the strike or picketing.

The MSPB, after noting the evidence of Richards' open and consistent opposition to the strike, nevertheless ruled:

> The crucial evidence, however, is that Appellant did not want to cross the picket line. H.T. at 845,846 (A.12).

The cursory opinion of the Federal Circuit did not address this issue. Instead, the Court merely affirmed the rationale of the Merit Systems Protection Board, stating that that Board's "discussion is adequate to sustain the Board's affirmance of the sanction of removal against him."

At the pages of the hearing transcript relied upon by the MSPB, the only relevant testimony which could possibly have been referred to by the Board was one statement by Richards, made to

Facilities Chief Anderson, that "there was no way that I could cross the picket line." But that statement was clearly not a statement of principle or of sympathy with the strikers. Instead, it reflected the harassment and dangerous non-cooperation from PATCO strike supporters which Richards had experienced on the job, and the threatening remarks made in his presence, such as that if controllers crossed the PATCO picket line "there would be some heads busted" (Tr.842). Richards' did not cross the line, not because he supported the strike, but because he feared for his wife's life. She knew of these threats and harassment, and was under medical orders to avoid psychological tension lest she suffer another stroke, and at the outset of the strike she was already under severe tension because of a family crisis--the unexplained disappearance of the two Richards children.

While some of this material may more properly be regarded as rebuttal testimony, we mention it here only to show the one statement to Anderson can hardly be regarded as evidence of sympathy with the strike or as a decision by Richards to support the strike or to make common cause with the strikers.

The Merit Systems Protection Board, in finding strike participation by Richards, purported to rely on Schapansky v. Department of Transportation, 735 F.2d 477 (Fed.Cir. 1984); Martel v. Department of Transportation, FAA, 735 F.2d 504; and Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed.Cir. 1984).

But in each of those cases there was affirmative evidence of participation. In Johnson (at 514), the employee was among the picketers, and had carried a strike sign. In Schapansky (at 483), the employee was among the picketers,

conceded that his absence was to protest the same conditions being protested by PATCO, and had voted in favor of the PATCO strike. And in Martel (at 507), Martel had walked off the job at the start of the strike on March 3 and joined the picket line after August 19.

There was no such evidence anywhere of picketing or other strike support by Richards in this record. Instead, all of the undisputed evidence here is that Richards not only did not support the strike, but was strongly opposed to it. There was no such evidence in Johnson, Schapansky, or Martel.

By affirming, without discussion, the decision of the Merit Systems Protection Board, the Federal Circuit has put its imprimatur on a decision which is directly contrary to the principles established by the Fourth, Fifth, and Sixth Circuits in Union Carbide, Southern

Greyhound, and Plain Dealer Publishing Co., supra. The decision of the Federal Circuit flouts the holding of those cases that there must be evidence that an employee' voluntarily has made common cause with strikers in order for him to be found to be a participant in a strike.

In the aforementioned "lead cases" regarding the 1981 PATCO strike, the Federal Circuit discussed at some length the issue of burden of proof. In Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (1984), the Court held that an employee's unexplained absence during an illegal strike is enough to establish a prima facie case of participation, but that establishing such a prima facie case shifts to the employer only the burden of going forward. Id. at 482. The Court went on to say (at 482):

> The burden of proving the charge by preponderance of the evidence is and remains throughout upon

> the agency. The order of presentation, however, is allocated in such a way that each party is required to give evidence in the area in which it has the better access to information. It may be that little countering evidence would be required, where, for example, the prima facie case was minimally supported. (Id. at 482.)

Here, proof of participation was surely only "minimally supported," if at all. The only evidence offered to prove participation was Richards' absence.

But that absence was not "unexplained." The undisputed testimony established: (1) threats and harassment against Richards; (2) Richards feared that his crossing a picket line, since his wife knew of those threats, would increase the existing tensions to which his wife had been subjected by family crises and thus threatened her life; and (3) Richards' Facilities Chief had assured him that even if he were discharged for failing to cross a picket line, the

Facilities Chief would exercise the discretion customarily vested in him to reinstate Richards after the strike.

In Johnson v. Department of Transportation, FAA, 735 F.2d 510, cited by the Federal Circuit in support of its decision herein, the Court said:

> If an employee refuses to work because of perceived threats or danger, it could be said that the element of acting in concert with others is missing, and that this is so, whether or not the employee's fears were those a reasonable person would have had in the circumstances. In other words, as showing that an employee believed himself threatened, even if that belief was unreasonable, negates an essential element of the offense of striking against the government.

In Johnson, of course, although there was evidence of such a fear, the MSPB and the Court found that there was substantial direct evidence of Johnson's participation in addition to that established by his mere absence. He had, for example, joined the picket line without any

explanation for his participation in the picketing other than the obvious inference that picketing showed his support for the strike. There is no such evidence here.

Thus the Federal Circuit has seriously departed from the rationale of the decisions rendered by the Fourth, Fifth, and Sixth Circuits by affirming a holding that participation in a strike can be shown by mere absence during a strike even in the face of affirmative evidence that the employee did not support the strike and in the face of unrefuted, rational explanations of reasons for his absence which were adequate to refute any inference of participation based on mere absence.

The Federal Circuit has also inexplicably abandoned its own earlier analysis of burdens of proof, and in so doing has now created a conflict which

needs to be resolved by this Court. If there is to be some distinction between proof of participation required to establish participation in private sector strikes as opposed to public sector strikes, then this Court should, we urge, explicate the purpose and proper application of such a distinction. But if, as we believe, there is no basis for such a distinction, then this Court should reverse, and resolve the conflict by clarifying what the burden of proof of strike participation is and should be.

The conflict between the Federal Circuit and the other circuits has implications with respect not only to strikes by public employees but also seriously destabilizes existing precedent on a significant and recurring core issue of federal private sector labor law. The need for resolution is compelling.

B. Significant Issues of Federal Law Are Presented by the Failure of the Federal Circuit Properly to Apply the Merit Systems Principles of 5 U.S.C. §2301 and the Related Doctrine of Estoppel in Pais

Petitioner's Facilities Chief, in order to dissuade Richards from resigning prior to the strike, had assured Richards that if he were discharged because he did not cross the PATCO picket line, the Facilities Chief expected to have substantial discretion in reinstating employees who might be discharged for such a failure, and had also assured Richards that he would exercise such discretion in Richards' favor. We argued below that Richards could reasonably rely on these assurances, since past history, including instances of which Petitioner Richards had direct knowledge, had shown that Facilities Chiefs were given such discretion in work stoppage situations.

We also urged that these assurances should be regarded as having estopped the agency from discharging Richards at the time of the strike in August, since the Facilities Chief had never advised Richards that such assurances could no longer be counted on.

These equitable principles of estoppel have independent validity here, but also should be taken into account in interpreting and applying the statutory merit systems principles which require, inter alia, that employees be "protected against arbitrary action" (5 U.S.C. §2301[b][8][A]) and that all employees "should receive fair and equitable treatment in all aspects of personnel management" (5 U.S.C. §2301[b][2]). The law (5 U.S.C. §2032[b][11]) prohibits discharge or other adverse actions

against federal personnel if any such action violates the said merit systems principles.

The principles of equitable estoppel and its application against the government have been set forth in such cases as TRW, Inc. v. FTC, 647 F.2d 942, 950-951 (9th Cir., 1981). Those principles are that estoppel applies when (1) the party to be estopped knows the facts, (2) the party intends that his conduct shall be acted on, and (3) the party asserting estoppel has reasonably relied on the other's conduct to his substantial injury. We respectfully submit that the undisputed evidence here shows conclusively that all of these tests were met and that estoppel should have been found.

This Court, in Raily v. Ohio, 360 U.S. 423 (1959), held that where government officials actively mislead,

the st ements, even if legally erroneous, are "the voice of the State most presently speaking to the appellants [the persons misled]." Id. at 439. See also Johnson v. United States, 318 U.S. 189,197. The assurances given by Richards' Facilities Chief were clearly "the voice of the State most presently speaking" to Richards.

The failure of the Federal Circuit to interpret statutory merit systems in the light of the estoppel in pais precedent recognized in other circuits and by this court itself poses a significant issue of federal law worthy of review by this Court.

The Federal Circuit's affirmation of the Merit Systems Protection Board ruling in this case also raises a second significant issue of federal employment law. For the Circuit affirmed, sub silentio, the highly questionable ruling

of the MSPB that the removal of any federal employee who fails to cross a picket line during an unlawful strike must be conclusively presumed to promote the efficiency of the service under 5 U.S.C. §7513. Under that Section, the removal of a federal employee can be sustained only it if does promote the efficiency of the service. Under 5 U.S.C. §2302(b)(10), merit systems principles also require a showing that removal is required because an employee's continuance in the federal employ would "adversely affect the performance of the employee or...the performance of others."

In the instant case, the highest officials at the FAA at Petitioner Richards' place of employment--Chicago's O'Hare Field--testified affirmatively, and without contradiction by any other FAA managers or supervisors, that Richards' return to service not only would

not have any adverse effect on his performance or the performance of others but that:

> It would be just the opposite (Tr.878).

and that:

> ...We would welcome the opportunity to have Bill...back at O'Hare (Tr.878).

and that Richards, if restored to service, would continue to be both dependable and reliable (Tr.209-210).

The Merit Systems Protection Board found that all such testimony was "not relevant now on the issue of the efficiency of the service" (A.25). The Court of Appeals' opinion affirms the MSPB's ruling on this issue without comment or analysis. The only possible explanation of this extraordinary ruling must be that the MSPB and the Court regard an employee's failure to cross the picket line in and of itself established an

irrebuttable presumption, or a ruling of law, that removing him "promote(s) the efficiency of the service" and that his continuance at work would "adversely affect [his] performance" or "the performance of others." Nothing in the law can justify such a holding. The MSPB itself has held that the "preponderance of the evidence" test of 5 U.S.C. §7701(c) applies to the relationship of an employee's conduct and the efficiency of the service, both as it relates to whether "any disciplinary action--is warranted and whether the particular sanction may be sustained. Douglas v. Veterans Administration, 5 MSPB 313,330 (1981). Relevant factors as to which proof must be made were listed by the MSPB as including "The effect of the offense upon...supervisors' confidence in the employee's ability to perform assigned duties." (Id. at 332.)

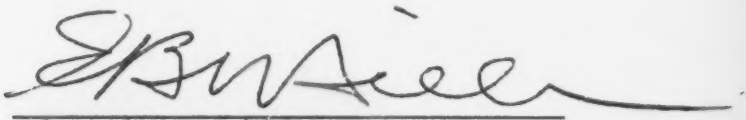
The Federal Circuit has now sanctioned a serious departure from the MSPB's own, clearly proper, interpretation of the law--that efficiency of the service" and whether the employee's conduct adversely affects his own performance or that of others is a factual, not a legal issue, and one on which supervisors' undisputed testimony cannot be brushed aside as "irrelevant." We respectfully submit that this is a seriously erroneous and unfair interpretation of important federal law, and borders on a denial of due process. We respectfully submit that this significant issue, too, cries out for the granting of certiorari in this case.

CONCLUSION

Due to the conflict in principle between the Federal Circuit and several

other circuits on important federal issues, and due to the importance of the Federal Circuit's erroneous interpretation of significant provisions of federal law governing the employment of public employees, we respectfully request that a writ of certiorari be granted to review the judgment and opinion of the Federal Circuit.

Respectfully submitted,



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APPENDIX

STATUTES

§2301. Merit system principles

(b) Federal personnel management should be implemented consistent with the following merit system principles:

* * *

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, martital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

* * *

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism, or

coercion for partisan political purposes...

* * *

§2302. **Prohibited personnel practices**

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

* * *

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

§7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

§7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * *

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

* * *

§7703. Judicial review of decisions of the Merit Systems Protection Board

* * *

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

[Caption deleted]

Before RICH, DAVIS, and SMITH, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively

decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

The full Board considered petitioner's case at length (along with that of other controllers) and that discussion is adequate to sustain the Board's affirmance of the sanction of removal against him. As the Board held, there was no estoppel of the Government arising from the conversations with the tower chief. We cannot overturn the administrative findings that (a) Richards' "reliance on selected remarks [of the chief] taken out of context were unreasonable" and (2) in any event, Richards' continued reliance (on that June conversation) during the August 3rd strike was unreasonable. With respect to petitioner's family situation (his wife's

illness and emotional status), the Board could permissibly hold that, in the emergency crisis of a nation-wide controllers' strike, that was not good cause for failing to come to work. As for the asserted coercion from the union and strikers, the peer pressure here was not greater than in Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984) and Martel v. Department of Transportation, FAA, 735 F.2d 504 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984).

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

OPINION AND ORDER OF THE
UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[Caption deleted]

OPINION AND ORDER

In a single initial decision issued on January 31, 1983, after a consolidated hearing, the removals of appellants from their positions as air traffic controllers at the O'Hare Air Traffic Control Center, Chicago, Illinois, were sustained on charges of striking in violation of 5 U.S.C. §7311 and absence without leave (AWOL).

Applying Schapansky v. Department of Transportation, MSPB Docket No. DA075281-F1130 (Oct. 28, 1981), appeal filed, No. 82-132 (Fed. Cir. Jan. 14, 1983), the presiding official found that the agency had made a prima facie case of strike participation by proving as to each

appellant his unauthorized absence during the strike period.

Each appellant then had the opportunity to rebut the prima facie case by showing that his absence was due to factors other than voluntary participation in the strike. Unpersuaded by the rebuttal evidence presented by each appellant, and finding the affirmative defense of equitable estoppel raised by appellants Metzker and Richards unproved, the presiding official determined that removal was for the efficiency of the service and was a reasonable penalty for striking. In reaching this conclusion, the presiding official relied on Schapansky, supra, at 9-12.

The appellants have filed separate petitions for review; the agency has responded to each petition. The petitions for review are GRANTED except for the challenges of the presiding

official's conclusion on the prima facie case against each appellant. The petitions raising that issue do not persuade us either that the Schapansky decision was incorrectly applied or that any findings in the Schapansky decision were erroneous.[2/]

We shall consider the petitions of the appellants in the following order: Andre Letourneau, James J. Vecchitto, John E. Misner, Dennis J. LeBeau, Ronny H. Metzker, and William L. Richards. The

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2/ See Noa v. Department of Transportation, MSPB Docket No. NY075281F0697 at 5 (Apr. 25, 1983), appeal filed, No. 83-1152 (Fed. Cir. June 27, 1983); Anderson v. Department of Tranpsortation, MSPB Docket SL075281F0347 at 3 (Apr. 25, 1983), appeal filed, No. 83-1152 (Fed. Cir. June 27, 1983); Campbell v. Department of Transportation, MSPB Docket No. DE075281F0674 at 4 (Apr. 25, 1983), appeal filed, No. 83-1173 (Fed. Cir. June 27, 1983). Any alleged errors in the Board's Schpansky decision will be resolved on judicial review.

challenge of the finding on the efficiency of the service, raised in the petitions of appellants LeBeau, Metzker, and Richards and based on similar evidence and common arguments, shall be considered by subject matter.

(Opinions relating to Andre H. Letourneau, James J. Vecchitto, John E. Misner, Dennis J. LeBeau, and Ronny H. Metzker, deleted.)

In his petition for review, appellant Richards challenges the failure of the presiding official to find that he had rebutted the showing of the prima facie case of striking by evidence that he openly opposed the strike; consistently voted against the strike, even on secret ballots; promoted ratification of the offered contract; and as a result suffered pressure and verbal abuse from other union members. The crucial evidence, however, is that appellant did not want to cross the picket line. H.T. at

845, 846. By not reporting to work in order not to cross the picket line, appellant therefore supported the strike in progress.

Appellant did not claim that threats of physical violence had been directed to him or that he feared crossing the picket line. The non-physical abuse he suffered as a result of his actions opposing the strike did not constitute the kind of duress cognizable under our decision in Johnson, supra.

Appellant also reargues his rebuttal that he did not report for duty because of concern for his wife's health.[16/] He again argues that family problems had put her under a strain and that serious acts of harassment and attempted violence

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16/ Appellant's wife had suffered a stroke some years previously and was under medical restrictions, one of which was to avoid psychological or mental tension.

against him would add to her stress. The facilities chief testified that there was no violence on the picket line and there was a police presence at the facility. H.T. at 174. Had appellant checked, he would have known that the likelihood of violence was small or non-existent and that he was in no danger. Moreover, appellant gives no explanation as to why he did not contact the faclity prior to his scheduled shifts on August 4 and 5 and his deadline shift on August 6 to explain and seek authorization for his absence because of his wife's health.

The presiding official correctly found that appellant Richards failed to rebut the prima facie case of striking made against him.

Appellant Richards also challenges the presiding official's conclusion that

he failed to prove the government should be estopped from removing him.[17/] Appellant claims that he was prepared to resign but that statements made by the tower chief induced him not to resign. Had he resigned, he would not have been striking and would not have been fired; or if fired, would have been eligible for rehiring after the strike.

Appellant testified essentially as follows: A strike was anticipated on June 22. Appellant did not want to cross the picket line and have to work with striking controllers later but he also did not want to break the law by striking. So he the [sic] decided the only thing he could do was resign. When the

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17/ The grounds for her conclusion,were the same as those for rejection of appellant Metzker's argument for estoppel discussed above. We did not adopt those reasons as the basis for our identical conclusion.

tower chief heard appellant had filled out resignation forms. the chief talked to him. Appellant explained his dilemma. The chief said he understood but wished appellant would come to work; but if he did not cross the picket line, it was best to stay with the union because the chief did not know how long it would be before appellant would be rehired. Appellant further testified that the chief told him that after the strike, if appellant should be fired, the chief would have no problem rehiring him because the chiefs at each facility would be given a great deal of discretion as to whom they wanted back. H.T. at 845-847.

The chief testified in substance that on June 19 he did have a conversation with appellant Richards concerning his decision to resign. The chief testified that he told appellant to think about it; that appellant should not strike but

should come to work; that if appellant resigned, he would be without a job and other controllers would still be on board; and that it would appear that appellant resigned rather than take a stand. The chief explained to appellant at that time that he understood appellant's position on the strike and the contract, and told Richards that he owed the union membership nothing. H.T. 855, 886. The chief also testified that he told appellant he felt the facilities' [sic] chiefs would have a lot of discre-

tion on who was going to be rehired if a strike occurred.[18/] H.T. at 885.

The presiding official made no credibility findings between the testimony of appellant Richards and the chief.[19/] The chief did not deny any of appellant's testimony. We see no conflict, and accept the testimony of both.

18/ Appellant does not dispute the summary of testimony in the initial decision, but alleges it is incomplete. We have reviewed what we take to be additional record evidence the appellant would have us consider. Most of what appellant would add is duplicative of or does not change materially the summary in the initial decision. We have added to our summary the chief's testimony that he expected to have discretion in who would be rehired after a strike.

19/ The presiding official stated that the chief "allegedly" told appellant Richards that if appellant were fired, the chief would have no problem rehiring him after the strike because facilities chiefs would have a great deal of discretion in whom they wanted back. I.D. at 23. This testimony was, however, corroborated in substance by the chief's own testimony.

Appellant claims that the chief's remarks to which appellant testified created an impression that misled him into not resigning. These remarks were not made in isolation. In the same conversation, the chief made remarks that, rather than discouraging the appellant from resigning, encouraged appellant to report to work during the anticipated June strike.

In addition, on June 21 when appellant called the chief at home to ask the latest time for resigning, the chief offered to meet appellant so he could submit his resignation papers by June 22. Appellant does not allege that the chief attempted to dissuade him from resigning at that time; the chief was willing to meet appellant so the papers could be submitted on time; and it is clear that a resignation would have been accepted. Reviewing the testimony on the

June conversations, we conclude that in deciding not to resign at that time, appellant's reliance on selected remarks taken out of context was unreasonable.[21/]

Assuming, nevertheless, that reliance would have been reasonable in June, appellant's continued reliance to the time of the August 3 strike was unreasonable. Based on the June conversations, appellant made his decision on June 22 not to resign. H.T. at 869. He thought constantly about the decision. H.T. at 870. Yet he did not communicate further with the chief on the subject.

On Saturday, August 1, a strike was threatened if no settlement was reached that weekend; and the tower chiefs were advised that no agreement for amnesty existed and there would be none. General Notice (GENOT) 119 (Agency File, Tab

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21/ See n. 14 supra.

5). The same GENOT advised the chiefs that employees participating in a strike would take the full consequences of their violation of federal law and their oath not to strike.

At the time of the anticipated June 22 strike, the tower chief and appellant might have speculated that the outcome of the strike would be consistent with past resolutions of work actions. See H.T. 848. Immediately prior to the August 3 strike, however, it was made clear to the chief that the government would take a firm position against strikers.

Appellant could have ascertained this development by a call to the chief (much as he called the chief the day before the anticipated strike of June 22 to inquire as to the last day for resigning) and then could have made a new decision whether to resign before the impending August 3 strike. Had appellant called,

he would have learned that prior speculations as to the resolution of this job action were not valid.

Appellant alleges he was still expecting events to unfold so that he would escape firing despite his striking. He should have been particularly careful to seek and act on current information because he had knowingly decided to engage in illegal conduct.

Appellant never called to ascertain his status prior to striking, when he could still have chosen to resign, or at any time prior to his deadline shift on August 6, when he could still have returned to work without risking removal. Therefore, either because appellant's reliance was misplaced originally or because his continued reliance on a stale conversation was misplaced when he could and should have obtained current information, we conclude that he

has failed to prove a case for estopping his removal.

EFFICIENCY OF SERVICE

Appellants LeBeau, Metzker, and Richards argue that their individual removals do not promote the efficiency of the service. They charge error in the failure of the presiding official to make findings on the testimony of their supervisors, including the deciding official, and fellow employees now working at the O'Hare facility, that appellants' return would promote the efficiency of the service. The failure of the presiding official to make findings is immaterial and thus not harmful error. See Baracco, supra, and Parker, supra.

The Board has held that 5 U.S.C. §7311 reflects the belief of Congress that discharging a Federal employee for participation in a strike against his employer promotes the efficiency of the

service because such misconduct affects both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission. Schapansky, supra; and Anderson, supra.

Under the agency guidelines for deciding whether a controller would return to work, a controller had to show at least that a legitimate factor prevented him from reporting for duty during the strike. Exercise of management judgment was to be "consistent and fair." Specifically, decisions were to be "based on the record related to the charges, not personal like or dislike of any individual." GENOT 141 (Appellants LeBeau, Metzker, and Richards Exhibit 1).

The testimony of the chief, who was the deciding official, that he would welcome appellants back to work now is not a concession that his decision to

remove was erroneous. The cited testimony of fellow controllers and supervisors does not relate to the seriousness of the misconduct, was not relevant at the time of the agency decision, and is not relevant now on the issue of efficiency of the service.

The presiding official correctly held that appellants' removals were for the efficiency of the service.

CONCLUSION

The initial decision dated January 31, 1983, sustaining the removals of appellants Dennis J. LeBeau, Andre J. Letourneau, Ronny H. Metzker, John E. Misner, William L. Richards, and James J. Vecchitto is AFFIRMED AS MODIFIED herein.

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-311

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. RICHARDS, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Merit Systems Protection Board's determination that petitioner was properly removed from federal employment on the grounds that he participated in a strike against the United States and was absent from his duty post without leave.

2. Whether the Federal Aviation Administration is estopped from removing petitioner from federal employment.

3. Whether removal from federal employment is an appropriate penalty for petitioner's participation in an unlawful strike against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A8) is reported at 795 F.2d 1016 (Table). The opinion of the Merit Systems Protection Board (Pet. App. A9-A25) is reported at 17 M.S.P.R. 160.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1986. The petition for a writ of certiorari was filed on August 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former air traffic controller, challenges his removal from federal employment following the air traffic controllers' strike in 1981. The background of the strike and subsequent litigation are set forth in our brief in

opposition in *Campbell* v. *Department of Transportation*, cert. denied, 469 U.S. 881 (1984), one of a number of other cases arising out of the strike.[1]

1. The Federal Aviation Administration (FAA) removed petitioner from his position as an air traffic controller on the grounds that he participated in a strike against the United States and was absent without leave during the strike. The Merit Systems Protection Board upheld petitioner's removal (Pet. App. A9-A25). The Board first concluded that a prima facie case against petitioner had been established by evidence demonstrating that petitioner was absent without leave during a strike of general knowledge (*id.* at A9-A10).[2] Petitioner attempted to rebut this showing by introducing evidence that his participation in the strike was involuntary because it was the result of coercion (*id.* at A12-A14).

The Board rejected petitioner's claim that he had been coerced into participating in the strike by the "pressure and verbal abuse from other union members" that he allegedly incurred as a result of his previous open opposition to the strike (Pet. App. A12). It stated petitioner "did not claim that threats of physical violence had been directed to him or that he feared crossing the picket line.

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[1] A copy of our brief in *Campbell* has been sent to counsel for petitioner.

[2] The Federal Circuit has held that the FAA at all times bears the burden of establishing strike participation; it must show by a preponderance of the evidence that the employee withheld his services in concert with others. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). Once the agency makes a prima facie showing of strike participation by presenting evidence of the employee's unauthorized absence during a strike of general knowledge, "the burden of going forward with evidence to rebut that showing necessarily shifts to the employee, who is in the best position to present explanatory evidence to counter that showing" (*ibid.*).

The non-physical abuse he suffered as a result of his actions opposing the strike did not constitute the kind of duress" necessary to rebut a showing of strike participation (*id.* at A13).[3] The Board also declined to adopt petitioner's argument that his conduct was coerced because he believed that his wife's poor health would be aggravated if he was subjected to the harassment and violence that he thought would accompany an attempt to cross the picket line (*id.* at A13-A14). The Board noted that there was no violence on the picket line and that the situation was monitored by the police. Moreover, petitioner did not advise his employer of his concern about his wife and attempt to obtain approval for his absence (*id.* at A14).

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[3] The Board noted (Pet. App. A13) that the legal standard to be applied in assessing a claim of coerced strike participation was set forth in its decision in *Johnson* v. *Department of Transportation, FAA*, 13 M.S.P.R. 652 (1982), aff'd, 735 F.2d 510 (Fed. Cir. 1984). The MSPB adopted—and the court of appeals approved—a "reasonable man" standard for establishing involuntary participation in a strike. The Board stated that

> in order for a Federal employee charged with participation in a strike against the Government to establish a defense of coercion or duress, he must demonstrate, by a preponderance of the evidence, that his failure to report for work was the result of a *threat or other intimidating conduct, directed toward him*, sufficient to instill in him a *reasonable* fear of *physical danger* to himself or others, which a person of ordinary firmness would not be expected to resist.

13 M.S.P.R. at 660 (footnotes omitted; emphasis added). Under this standard, "menacing tones or language, fear of 'financial ruin' or jeopardy to career advancement, exuberant moral suasion, or any vexation, annoyance or pressure resulting in a state of mental perturbation, reluctance to act, or a choice of inherently unpleasant situations" do not standing alone render involuntary an individual's participation in a strike (*id.* at 658-659 (footnotes omitted)).

Petitioner also asserted that the FAA is estopped from removing him from federal employment. He claimed that he offered to resign in June 1981 and did not do so because of comments made by his supervisor that, in petitioner's view, amounted to a commitment to rehire petitioner in the event he was removed for strike participation (Pet. App. A15-A18). The Board concluded that, assuming petitioner relied upon the supervisor's statements, any such reliance was not reasonable. It found that the supervisor encouraged petitioner to report for work in the event of a strike and indicated that petitioner was free to resign and that he would assist in the processing of petitioner's resignation if petitioner chose to resign (*id.* at A19-A20).

The Board further concluded that even if petitioner's reliance could be deemed reasonable in June 1981, when the conversations with his supervisor took place, continued reliance upon the supervisor's comments had become unreasonable by the time of the August 3, 1981 strike. As the deadline for the strike approached, no further discussions took place between petitioner and his supervisor, even though petitioner claimed that he constantly thought about resigning (*id.* at A20). The Board observed that the supervisor had been advised in the interim that there would be no amnesty for strikers. It stated that petitioner "should have been particularly careful to seek and act on current information because he had knowingly decided to engage in illegal conduct" (*id.* at A22). Since petitioner's "continued reliance on a stale conversation was misplaced when he could and should have obtained current information," petitioner "failed to prove a case for estopping his removal" (*id.* at A22, A23).

Finally, petitioner argued that his removal did not promote the efficiency of the FAA because he had been a good employee. The Board rejected this contention, observing that the statutory prohibition against strikes by federal employees "reflects the belief of Congress that

discharging a federal employee for participation in a strike against his employer promotes the efficiency of the service because such misconduct affects both the employee's ability to accomplish his duties satisfactorily and the agency's ability to fulfill its mission" (Pet. App. A23-A24).

2. The court of appeals affirmed the Board's decision (Pet. App. A6-A8).[4] It observed that "[t]he full [MSPB] considered petitioner's case at length * * * and that discussion is adequate to sustain the Board's affirmance of the sanction of removal against him" (*id.* at A7). With respect to petitioner's claim that his participation in the strike was coerced, the court of appeals found that the peer pressure cited by petitioner was no greater than the pressures upon air traffic controllers in two previous cases in which the court had rejected the coercion defense. *Id.* at A8, citing *Johnson* v. *Department of Transportation, FAA, supra*, and *Martel* v. *Department of Transportation, FAA*, 735 F.2d 504 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). The court also concluded that the Board correctly held that "there was no estoppel of the Government arising from [petitioner's] conversations with [his supervisor]" (Pet. App. A7).

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[4] Petitioner's petition for review in the court of appeals was among approximately 3,500 such petitions filed by discharged air traffic controllers. All but nine cases were stayed pending the court's decisions in those cases. On May 18, 1984, a five-judge panel of the court of appeals issued decisions sustaining the removals of all but one of the petitioners in the lead cases. A number of the unsuccessful petitioners filed petitions for writs of certiorari; all of those petitions were denied by this Court. *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Anderson* v. *Department of Transportation, FAA*, 735 F.2d 537 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984); *Campbell* v. *Department of Transportation, FAA*, 735 F.2d 497 (Fed. Cir.), cert. denied, 469 U.S. 881 (1984). The court of appeals then lifted the stay and began to consider the other pending petitions for review.

ARGUMENT

Petitioner's basic claim is that the MSPB and the court of appeals erred in concluding that he participated in the illegal strike. The decision of the court of appeals with respect to this fact-bound issue is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Petitioner raises several challenges to the Board's factual finding that he actively participated in the strike. He first contends (Pet. 11-19) that the FAA did not carry its burden of establishing that he participated in the strike. As we discussed in our brief in opposition (at 6-8 & nn. 5-6) in *Campbell* v. *Department of Transportation*, cert. denied, 469 U.S. 881 (1984), direct proof of participation is not required where the employee has not rebutted the agency's prima facie case of strike participation. Here, the FAA established its prima facie case by showing that petitioner was away from his duty post without authorization during a strike of general knowledge. Accord *Schapansky* v. *Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984). Petitioner's claim therefore must fail unless he rebutted the agency's showing of strike participation.

Petitioner argues (Pet. 18-21) that his showing of coercion was sufficient to rebut the FAA's prima facie case. The Board (Pet. App. A12-A14) and the court of appeals (*id.* at A7-A8) correctly concluded, however, that petitioner did not establish that his conduct was coerced because he did not demonstrate "a threat or other intimidating conduct, directed toward [petitioner], sufficient to instill in him a reasonable fear of physical danger to himself or others, which a person of ordinary firmness would not be expected to resist" (*Johnson* v. *Department of Transportation, FAA*, 735 F.2d 510, 513 (Fed. Cir.

1984)).[5] In the absence of a showing of a direct threat of physical harm or any evidence that petitioner or his wife was in any danger, the Board and the court of appeals properly concluded that petitioner's fear was not sufficient to excuse his strike participation.

2. Petitioner's attempt to revive his estoppel defense (Pet. 22-25) is nothing more than an effort to relitigate the question whether his alleged reliance upon his supervisor's statements was reasonable. The resolution of that fact-bound question is not an issue appropriate for review by this Court.

As a threshold matter, of course, it is not clear that an estoppel ever may be asserted against the government. But "the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984); see also *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 9. Petitioner does not dispute that the party asserting an estoppel must reasonably rely upon the other party's conduct (Pet. 24). The Board (Pet. App. A19-A20, A22-A23)—and the court of appeals (Pet. App. A7)—correctly concluded that petitioner's reliance was unreasonable.

3. Finally, petitioner contends (Pet. 25-29) that the penalty of removal is not justified when an employee participates in an unlawful strike against the United States.

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[5] Petitioner appears to contend (Pet. 19-20) that the reasonableness of his belief is not relevant in determining whether his participation in the strike was coerced. But the court of appeals specifically rejected that position in *Johnson*, concluding that strike participation is involuntary only if the fear that led to the participation was objectively reasonable (735 F.2d at 513-515). We discuss the reasons justifying this standard in our brief in opposition (at 10-12) in *Russell* v. *Department of Transportation, FAA*, cert. denied, No. 85-1229 (June 2, 1986). We have supplied a copy of that brief to petitioner's counsel.

We addressed that issue in our brief in opposition (at 10-12) in *Campbell* and this Court denied the petition in that case; our analysis in *Campbell* also applies to petitioner's arguments here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

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